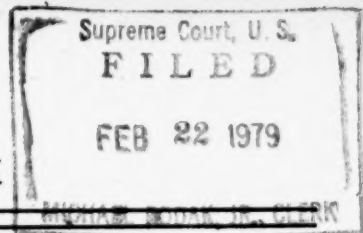


APPENDIX



**In the Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-744

UNITED STATES OF AMERICA,

*Petitioner*

—v.—

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1978  
CERTIORARI GRANTED JANUARY 8, 1979

**In the Supreme Court of the United States**

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**No. 78-744**

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UNITED STATES OF AMERICA,

*Petitioner*

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CHARLES TIMMRECK

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## RELEVANT DOCKET ENTRIES

1976

September 9 Motion to Vacate Sentence, filed.

September 7 Govt's supplemental answer & brief in response to motion to vacate

September 13 Pltf's amended motion to vacate guilty plea with affidavit.

September 13 Proof of service re pltf.'s supplemental memorandum of law in support of motion to vacate. BA (out of order)

September 8 Motion to vacate sentence (plea) taken under advisement. DD 9/15/76 Feikens, J.

Sept. 15 Government's Second Supplemental Answer in Opposition to Deft's motion to vacate guilty plea with BA & proof of service.

Dec. 6 Memorandum opinion denying pltf.'s motion to vacate sentence, filed and entered. (judge signed 12/3/76) DD 12/7/76 Feikens, J.

Dec. 6 Order denying pltf.'s motion to vacate sentence, filed and entered (judge signed 12/3/76) DD 12/7/76 (cards sent) Feikens, J.

Dec. 28 Notice of appeal by pltf. with proof of service. DD 1/5/77

1977

Jan. 4 Copy of letter to atty. for pltf. re appeal with attachment. DD

Jan. 4 Proof of mailing re notice of appeal by pltf. DD 1/5/77

Feb. 22 Stip. for designation of record on appeal and for joint appendix. DD 2/23/77

June 2 Order from C.C.A. extending time to docket record on appeal until June 24/77. DD 6/3/77.

Sept. 7 Record on Appeal. DD 9/12/77

Sept. 21 True copy of motion from CCA granting extension of time for transmission of record on appeal. DD 9/23/77.

## GUILTY PLEA PROCEEDINGS

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

[2]

Detroit, Michigan  
Friday, May 24, 1974  
About 9:30 a.m.

THE CLERK OF THE COURT: Criminal Action No. 47253, The United States of America versus "Hyland" Charles Fye.

THE COURT: Mr. Mogill.

MR. MOGILL: If it please the Court, I have had an opportunity to consult with my client and also I have had an opportunity to discuss this matter with him, and also discussed it with Mr. Kaufman.

At this time he will withdraw the previously entered plea of not guilty and enter a plea of guilty to Count I of the Indictment.

MR. KAUFMAN: Your Honor, may I say something?

THE COURT: Yes.

MR. KAUFMAN: This is a part of a plea bargain arrangement which we have done with other defendants in this case, your Honor, and I have agreed with Mr. Mogill and his client that after sentencing I will dismiss, or the Government will dismiss the remaining [3] Counts of the Indictment.

Further, we agree that we will not pursue an Indictment or charge under 3150, that is the bond jumping charge. Other than that, we have made no other agreements with counsel or with the Defendant.

Is that correct?

MR. MOGILL: That is correct.

THE COURT: You understand that, Mr. Fye?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Let the record show that your full name is Hyland C. Fye; is that correct?

THE DEFENDANT: My name is Charles Timmreck.

THE COURT: Well, it's known here as Hyland C. Fye, and how are you really known, by Charles Timmreck?

THE DEFENDANT: Charles Timmreck.

THE COURT: And what is the Hyland C. Fye, an alias?

THE DEFENDANT: Yes, your Honor.

THE COURT: So the record will note, then, that you appear here as Charles Timmreck, also known [4] as Hyland C. Fye, or Hyland C. Fye whose real name is Charles Timmreck.

THE DEFENDANT: That's correct.

THE COURT: Now, you prefer, then, that I address you as Mr. Timmreck?

THE DEFENDANT: Yes, your Honor.

THE COURT: Any objection to that?

MR. KAUFMAN: No, sir, your Honor.

THE COURT: Can it be understood that the Indictment to which the plea is being made as to Count I is amended in form so as to carry that out?

MR. KAUFMAN: I will so move.

THE COURT: Mr. Timmreck, how old are you?

THE DEFENDANT: 38.

THE COURT: Do you know of any difficulty that you have, either medical or in any psychiatric sense that prevents you from understanding the nature of what goes on here today?

THE DEFENDANT: No, your Honor.

THE COURT: You see, what I want to get at and be sure of is that you fully understand what you are doing.

[5] THE DEFENDANT: Yes, sir.

THE COURT: Are you of the opinion that you do?

THE DEFENDANT: Yes, sir.

THE COURT: I take it that you have no trouble with drug addiction, do you?

THE DEFENDANT: No, your Honor.

THE COURT: Now, in this case, as you know, there is a trial going on as to at least some of the Defendants who were indicted in this case along with you. You know that now?

THE DEFENDANT: Yes.

THE COURT: And I only bring that up to say that you do have a right, if you elect so to do, to stand trial in this case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And if you so elect, you could do that. The Government would have to prove your guilt beyond a reasonable doubt. You would not have to prove your innocence on your behalf.

Mr. Mogill could cross-examine witnesses who appeared against you, and you would have the right to remain silent; you would not have to take [6] the witness stand if you chose not so to do, and if you didn't, I would instruct the jury that they could draw no adverse inference against you.

These are the rights that you have. Now, do you understand those rights?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you waive those rights?

THE DEFENDANT: Yes, sir.

THE COURT: In this document that was handed to me, your signature appears as Hyland C. Fye, appears as Charles Timmreck?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign that?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read it before you signed it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any questions that you want to put to Mr. Mogill or me with regard to the waiver of your Constitutional rights?

THE DEFENDANT: No, sir.

THE COURT: I take it, then, that you [7] know what those rights are, and you consciously waive those rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you of the opinion that Mr. Timmreck has done that, Mr. Mogill?

MR. MOGILL: Yes, I am, Judge.

THE COURT: Now, if I accept your plea of guilty,

Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?

THE DEFENDANT: No, sir.

THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is \$25,000. Have you been told that?

THE DEFENDANT: I have now, yes.

THE COURT: Now you know?

THE DEFENDANT: Yes, sir.

THE COURT: I want you to be thoroughly advised as to that, because if you wish, knowing now that it's possible that if I accept your plea of guilty, that that's what could happen in this case. You would have a right, if you wish at this stage to withdraw [8] your plea.

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to change your mind and not plead?

THE DEFENDANT: No. I was in the thing, and as far as marijuana was concerned. I was involved in that, but nothing else.

THE COURT: I wasn't asking you whether or not you plead guilty, and I thank you for telling me what you have, but I want to be sure before I take your plea that you know what the consequences could be.

THE DEFENDANT: Yes.

THE COURT: I have sentenced men to jail in this case before.

THE DEFENDANT: Yes, sir.

THE COURT: And I want you to know that while I don't know what the sentence will be in your case, I want you to know what the outer limits might be.

THE DEFENDANT: Yes, sir.

THE COURT: You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In view of that, how do [9] you plead?

THE DEFENDANT: I plead guilty.

THE COURT: To Count I of this Indictment?



THE DEFENDANT: Yes, sir.

THE COURT: Now, Mr. Timmreck, tell me what your involvement was? What did you do that brings you to the point that you say you are guilty of the charges contained in Count I of this Indictment?

THE DEFENDANT: Well, I did receive some marijuana through these people, and—

THE COURT: By "these people," you mean some of the—

THE DEFENDANT: Some of the Defendants who were indicted, were involved in the trial right now.

THE COURT: Who did you—

MR. MOGILL: If it please the Court—

THE COURT: Mr. Mogill, I have been listening to cases and testimony—

MR. MOGILL: I understand that.

THE COURT: And I am sure that this is not going to in any way affect anybody's rights because I am not the trier of the facts.

[10] MR. MOGILL: I understand that. I would just urge the Court, I believe the substantive facts are made out without specification of names.

THE COURT: I think maybe you are right, particularly when I have had the opportunity of securing possible corroborations, what I have been told through the facts that have been testified to in this court.

MR. MOGILL: Thank you, Judge.

THE COURT: Let's leave it at that.

Some of these co-defendants of yours from whom you got marijuana; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, what you are charged here with is a conspiracy. Do you know what a conspiracy is? It's an agreement. Did you enter into an agreement of some kind? I don't mean in written form, but did you and these others act together, in concert together? Did you undertake to do some certain things with regard to marijuana?

THE DEFENDANT: Well, I did receive the marijuana, yes.

THE COURT: Yes?

THE DEFENDANT: But I did not, you [11] know, know exactly how it got to Detroit.

THE COURT: And what was your part in the arrangement or agreement? What did you have to do?

THE DEFENDANT: Well, I just receive some of it and sold it for them.

THE COURT: For the group?

THE DEFENDANT: Yes.

THE COURT: Is that right?

THE DEFENDANT: Yes.

THE COURT: You know that there were a number of persons that were involved?

THE DEFENDANT: Actually, the involvement of mine was with just a couple.

THE COURT: It doesn't matter how many.

THE DEFENDANT: —because I was in California most of the time.

THE COURT: It doesn't matter how many, Mr. Timmreck. The question I'm getting at is that you knew there was an arrangement of some kind in which you participated; is that correct?

THE DEFENDANT: Well, I realized they did bring it here from Mexico, I suppose, and I took [12] a portion of what they had and sold it.

THE COURT: Now, the Indictment in Count I says this took place sometime between April of 1970 up to and including the 10th of May 1972.

Did the activity to which you make reference occur within that period?

THE DEFENDANT: Yes, sir.

THE COURT: Between April of '70 and May 10th of '72?

THE DEFENDANT: Yes, sir.

THE COURT: And in your activities, you say that much of it occurred in California?

THE DEFENDANT: Well, not really. I mean, with those people, I was in California most of the time.

THE COURT: I see.

THE DEFENDANT: But I came back here for Christmas and then I met the people.

THE COURT: Did some of your activities occur in this area?

THE DEFENDANT: This area, yes, your Honor.

THE COURT: Can you give me some idea [13] of what you did in the Detroit area?

THE DEFENDANT: Well, I probably all told, at the very most, sold two hundred pounds of marijuana.

THE COURT: In this area?

THE DEFENDANT: Yes, sir.

THE COURT: As a result of this arrangement that you had with the people?

THE DEFENDANT: Yes, sir.

THE COURT: Is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, at the time that you did this, you knew that this was wrong, an offense against the law?

THE DEFENDANT: Well, at the time, your Honor, I think they had just ruled that the Michigan law was thrown out for a while.

THE COURT: I am talking about the Federal law. Since this is a United States Court, I can't really be concerned directly with Michigan law.

THE DEFENDANT: Yes, sir.

THE COURT: Did you have knowledge, Mr. Timmreck, that what you were doing was wrong and [14] contrary to our law?

THE DEFENDANT: Well, yes. I knew.

THE COURT: There is no question about that, is there?

THE DEFENDANT: No, sir.

THE COURT: That's why you say you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are there any other questions with regard to a factual basis for a plea of guilty to Count I to this Indictment, Mr. Kaufman?

MR. KAUFMAN: I have no further questions. The evidence does show that he was involved in other drugs, however, your Honor.

THE COURT: I think, Mr. Mogill, in view of the fact that I am in the unusual circumstances of listening to testimony, even though I am not the trier of the facts, I can't accept that as corroborative of a plea of guilty in this case.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: I'm sure you do.

Now, has anyone forced you to make [15] this plea of guilty?

THE DEFENDANT: No, your Honor.

THE COURT: You are doing this, then, as I understand, because you want to do it, voluntarily.

THE DEFENDANT: Yes, sir.

THE COURT: Outside of the understanding that Mr. Kaufman stated a moment ago, that is that all of the remaining Counts in this Indictment be dismissed against you and that there would be no prosecution against you for having jumped bail, so to speak—

THE DEFENDANT: Yes.

THE COURT: You understand what I mean by that?

THE DEFENDANT: Yes.

THE COURT: Outside of those promises, have there been any other promises of any kind made to you in order to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: You have not been threatened in any way?

THE DEFENDANT: No, sir.

THE COURT: Mr. Mogill, are you of the opinion that there is a factual basis for this plea?

[16] MR. MOGILL: Yes, I am.

THE COURT: And that your client knows full well the consequences of a guilty plea might be?

MR. MOGILL: That's correct.

THE COURT: Very well, Mr. Timmreck, I will accept your plea of guilty to Count I of this Indictment.

I find on this record that you have voluntarily made this plea of guilty; that you have knowingly and consciously waived your Constitutional right in order to

make this plea; that you make the plea knowing full well what the possible consequences of your plea; and finally, that there is a factual basis for the plea of guilty to Count I.

So, I will accept it and I will refer your case to the Probation Department of this Court for a presentence report, and I will remand you to the custody of the Marshals to await sentencing.

THE DEFENDANT: Yes, sir.

THE COURT: Anything further?

MR. KAUFMAN: Nothing further, your Honor. Thank you.

THE COURT: We will be in recess.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

No. 76-71867

[Filed September 13, 1976]

CHARLES TIMMRECK, PLAINTIFF

—vs.—

UNITED STATES OF AMERICA, DEFENDANT

AMENDED MOTION TO VACATE GUILTY PLEA

NOW COMES CHARLES TIMMRECK, Plaintiff herein, by and through his attorney KENNETH M. MOGILL, and moves this Honorable Court for an Order vacating his guilty plea in this cause for the following reasons:

1. On May 24, 1974, Plaintiff pled guilty in this Court to distribution of a controlled substance in violation of 21 USC § 841(a)(1).

2. On September 19, 1974, Plaintiff was sentenced to a prison term of ten (10) years, plus a five thousand (\$5,000.00) dollar fine and special parole term of five (5) years.

3. When questioned by the court at the time of his plea, Plaintiff indicated that he did not understand the consequences of his plea of guilty.

4. F R Crim P 11 requires that before a judge may accept a plea of guilty he or she must determine that the plea is made voluntarily, with an understanding of the nature of the charge and the consequences of the plea.

5. In advising Plaintiff of the consequences of his guilty plea in this case, the court failed to inform Plaintiff of the mandatory special parole term required by 21 USC § 841(a)(1).

6. This motion is brought pursuant to 28 USC § 2255.



WHEREFORE, Plaintiff prays this Court for an Order vacating his guilty plea herein.

Respectfully submitted,

/s/ Kenneth M. Mogill  
KENNETH M. MOGILL P17865  
Attorney for Plaintiff  
1455 Centre Street  
Detroit, Michigan 48226  
962-7210

Dated: September 10, 1976

# AFFIDAVIT

STATE OF MICHIGAN     )  
                                  ) SS.  
COUNTY OF WAYNE     )

Kenneth M. Mogill being first duly sworn, deposes and says that he has read the foregoing Motion by him subscribed and knows the contents contained therein to be true, except those matters stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ Kenneth M. Mogill  
KENNETH M. MOGILL

Subscribed and sworn to before me this 10th day of September, 1976

/s/ Karen E. Cairns  
KAREN E. CAIRNS  
Notary Public, Wayne County, Michigan

My Commission Expires: 2/20/80

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

No. 47253

UNITED STATES OF AMERICA, PLAINTIFF

—vs.—

CHARLES TIMMRECK, a/k/a HYLAND C. FYE, DEFENDANT

BRIEF IN SUPPORT OF MOTION TO VACATE  
GUILTY PLEA

STATEMENT OF FACTS

On May 24, 1974, Defendant pled guilty before this Court of distribution of a controlled substance, in violation of 21 USC § 841(a)(1). At the time of the taking of the plea, the Court advised Defendant of the maximum time to which he could be sentenced and the maximum fine which could be imposed. The Court failed, however, to inform Defendant of the mandatory special parole term to which he would be subject if he were sentenced to a prison term of any length.

The relevant colloquy was as follows:

Now, if I accept your plea of guilty, Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?

Defendant replied that he did not know, and the Court continued:

Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is \$25,000. . . . I want you to be thoroughly advised as to that, because if you wish, knowing now that it's possible that if I accept your plea of guilty, that that's what could happen in this case (p 7).

At the conclusion of the hearing, without further mention of any additional consequences, the Court accepted Defendant's plea of guilty.

Defendant was subsequently sentenced on September 19, 1974, to a prison term of ten (10) years plus a five thousand (\$5,000.00) dollar fine and a special parole term of five (5) years.

This is Defendant's Brief in Support of Motion to Vacate Guilty Plea.

ARGUMENT

WHERE A DEFENDANT WHO DOES NOT KNOW THE CONSEQUENCES OF HIS GUILTY PLEA IS NOT ADVISED AT THE TIME OF HIS PLEA THAT A SPECIAL PAROLE TERM IS MANDATORY IF A PRISON SENTENCE SHOULD BE IMPOSED IN HIS CASE, DEFENDANT HAS NOT BEEN ADVISED OF THE CONSEQUENCES OF HIS PLEA WITHIN THE MEANING OF F R CRIM P 11, AND A PLEA SO MADE MUST BE SET ASIDE.

This motion is brought pursuant to the provisions of 28 USC § 2255, which provides in pertinent part that a person in the custody of the United States challenging the lawfulness of that custody may move in the Court which imposed his or her sentence to vacate that sentence and plea.

F R Crim P 11 requires that a district court may not accept a plea of guilty "without first addressing the Defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." In order for the plea to be voluntarily made, it must be made by "one fully aware of the direct consequences" *Brady v. United States*, 397 US 742, 755, 90 Sct 1463, 25 LEd2d 747, 760 (1969), of the plea.

This requirement grows out of a concern that guilty pleas be truly voluntary.

Numerous courts, including this Sixth Circuit, have considered whether a mandatory special parole term is a "direct consequence" within the meaning of Rule 11 and *Brady, supra*. Their answers have been affirmative.

In *United States v. Wolak*, 510 F2d 164, 166 (6th Cir, 1975), a case arising out of this district, the district judge had failed to inform the Defendant of the special parole provision mandated by the same statute involved here, and for that reason the Court of Appeals vacated the Defendant's plea. The Court noted that:

Although the emphasis in the case law has been upon the requirement that the judge inform the Defendant of the maximum possible period of incarceration, this circuit and others have indicated that a Defendant must be aware of other direct consequences of his plea. . . It is our determination that, in order to comply with Rule 11, the district judge must inform a Defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitations on parole or probation.

See also *United States v. Yazbeck*, 524 F2d 641 (1st Cir, 1975); *Ferguson v. United States*, 513 F2d 1011 (2nd Cir, 1975); *United States v. Valenciano*, 495 F2d 1236 (3d Cir, 1974); *United States v. Richardson*, 482 F2d 516 (8th Cir, 1974).

Defendant here was charged under and pled guilty to violation of 21 USC § 841(a)(1) which requires that "any sentence imposing a term of imprisonment under this paragraph shall . . . impose a special parole term of at least three years, in addition to such term of imprisonment". This special parole term has unique terms in that it is mandatory for Defendants who are sentenced to imprisonment and it is given in addition to rather than in substitution for regular parole, provisions making it all the more important that the plea taking judge carefully explain its provisions to a Defendant in order for him or her fully to comprehend the consequences of a guilty plea. Defendant did not know of the mandatory special parole term, and he was

not advised of it at the time of his plea. F R Crim P 11 was therefore not complied with, and his plea must be set aside.

### CONCLUSION

For all the reasons stated above, Defendant's guilty plea should be vacated.

Respectfully submitted,  
/s/ Kenneth M. Mogill  
KENNETH M. MOGILL P17865  
Attorney for Defendant  
1455 Centre Street  
Detroit, Michigan 48226  
962-7210  
Molly Reno  
(Legal Assistant)

Dated: August 10, 1976

## HEARING ON MOTION TO VACATE GUILTY PLEA

[2]

Detroit, Michigan  
 Wednesday, September 8, 1976  
 About 3:00 P.M.

THE CLERK: Call the case of Charles Timmreck versus the United States—this is Criminal Action Number 47253. It will be given a new civil number.

MR. MOGILL: Good afternoon, Judge.

We are here this afternoon on the Plaintiff's motion to vacate the guilty plea in this case. This motion is brought pursuant to 28 United States Code Section 2255.

Essentially what is alleged is that the plea was taken in this case did not comply with Rule 11 for the reason that at the time of the taking of the plea, the Defendant was not advised of the special parole provisions of the Federal Drug Act.

THE COURT: Do you have a copy of the transcript of the plea?

MR. MOGILL: I do have. I don't know if I brought it with me. The Government is in agreement.

MR. ZUCKERMAN: Your Honor, for the record, my name is Richard Zuckerman. I am an attorney for the Department of Justice, and I have a copy of the plea if the Court would like to see it.

THE COURT: I have a copy.

[3] I'm sorry, Mr. Zuckerman. Could I see that a moment, please.

MR. ZUCKERMAN: Certainly, Your Honor.

THE COURT: Because I want to address your attention to your motion because I am not able to understand paragraph 3.

In paragraph 3 you say: "When questioned by the Court at the time of his plea, Defendant indicated that he did not understand the consequences of his plea of guilty."

Now, on page 7, if you will turn to the transcript—I take it that what you are referring to is that statement by the Court:

"Now, if I accept your plea of guilty, Mr. Timmreck, you understand what the possible consequences of a plea of guilty to count one of this indictment could be in terms of punishment?"

"THE DEFENDANT: No, sir."

MR. MOGILL: Yes.

THE COURT: But you didn't go on to state what next happened.

I then say:

"THE COURT: Have you been told [4] that you could serve as long as 15 years in jail and be subjected to a substantial fine—and I believe the fine is \$25,000. Have you been told that?"

"THE DEFENDANT: I have now, yes."

"THE COURT: Now you know?"

"THE DEFENDANT: Yes."

"THE COURT: I want you to be thoroughly advised as to that because if you wish, knowing that it is possible that if I accept your plea of guilty, that that's what could happen in this case. You would have a right, if you wish at this stage to withdraw your plea."

"THE DEFENDANT: Yes."

"THE COURT: Do you wish to change your mind and not plead?"

"THE DEFENDANT: No."

I am not able to understand what you mean in paragraph 3.

MR. MOGILL: That fact is, Judge, there is no intention on my part or anyone's part of taking anything out of context. Mr. Timmreck was advised of the possibility of the maximum imprisonment; was advised of the possibility of the maximum fine. He was not advised as to the mandatory [5] special parole term.

THE COURT: What do you say to this at page 16—well, we ought to start at the bottom of 15:

"THE COURT: Mr. Mogill, are you of the opinion that there is a factual basis for this plea?"

"MR. MOGILL: Yes, I am."

"THE COURT: And that your client knows full well the consequences of a plea of guilty—or what the consequences of a plea of guilty might be?"



"MR. MOGILL: That is correct."

What were you thinking about when you said that to me?

MR. MOGILL: I think, Judge, when I—

THE COURT: I asked you what you were thinking about.

MR. MOGILL: I am attempting to answer.

THE COURT: Not what Mr. Timmreck was thinking about.

MR. MOGILL: I have no basis for reconstructing my memory in May of 1974. I can only say that, just as I—the Court had no intention to delete—

[6] THE COURT: Did you discuss the possible consequences of the plea or not?

MR. MOGILL: Judge, I have no way of knowing.

THE COURT: Did you or did you not?

MR. MOGILL: I have no way of knowing.

THE COURT: Why did you represent to me, if you did not—

MR. MOGILL: I would like to finish what I had begun to state to the Court.

THE COURT: I would like to hear something other than evasive answers.

MR. MOGILL: I am not attempting to evade. If I could finish the sentence, that, perhaps, could satisfy the Court. If not, I will answer anything the Court asks me.

I have no way of knowing whether I discussed with Mr. Timmreck the requirements of the special parole term. If I didn't, I was in error in advising the Court that I fully advised him of the consequences. I just don't know two years later whether I did or not. And I advised the Court that I had discussed it with him. I have no way of knowing whether or not that discussion included the special parole term.

[7] If I hadn't, it was not an intentional omission on my part. I have no way of knowing what was stated.

THE COURT: Are you finished?

MR. MOGILL: And I am happy to—

THE COURT: Is it a part of your custom to represent a client and not to explain what the implications of his plea of guilty might be in terms of sentencing?

MR. MOGILL: No, Judge.

THE COURT: Don't you follow the practice in every case of doing this?

MR. MOGILL: Judge, I cannot state that I did or did not explain to Mr. Timmreck the requirements of the special parole term in this case.

THE COURT: Doesn't it indicate that you did?

MR. MOGILL: It indicates that. The record speaks for itself. I have no way of supplementing that record.

THE COURT: Let's just say the record speaks for itself.

Let me ask you this: Mr. Timmreck knew, did he not, that he was exposed here by his plea to [8] a sentence for as long as 15 years—

MR. MOGILL: That is correct.

THE COURT: —in custody. And that he could be subjected to a substantial fine, and that was mentioned, \$25,000; is that not right?

MR. MOGILL: The record speaks for itself.

THE COURT: In fact, he did not receive a 15 year prison sentence, did he?

MR. MOGILL: He received a ten year sentence.

THE COURT: Right, plus a five-year special parole term.

MR. MOGILL: That is correct.

THE COURT: Justice Stevens—then Justice Stevens of the 7th Circuit, in talking about that kind of situation, said that there were two problems that were involved in a situation similar to this, and that is whether or not the plea was voluntary, and voluntariness had to be considered at a point in time prior to the sentence, not after the sentence; and secondly, whether or not the sentence, when taken in its entirety was fair. And on the fairness issue, he said this, at page 599 of 517 Federal Reporter 2d. I suppose his opinion is entitled [9] to a little extra persuasiveness since he is now a Justice of the Supreme Court.

On the fairness issue, I think the advice should be compared with the actual sentence rather than with a direct statement of the sentence that might properly have been imposed. As long as the actual sentence was

less than the maximum as described in the Judge's advice, I would find no unfairness and certainly not any unfairness sufficiently grave to qualify as constitutional error.

Now, in *Bachnar versus the United States*, there was a trial judge's failure to advise the petitioner that he would have to serve a special parole term of at least three years. Judge Stevens said that did not make the plea involuntary, and on the fairness issue he said what I have just read.

Now, how is what is revealed in this transcript unfair to Mr. Timmreck when he was told that his exposure could have been as much as 15 years in jail and he was not sentenced to 15 years in jail. He was sentenced to ten years, and you told me that you had thoroughly advised him of the possible consequences of his guilty plea.

Now, under those circumstances, where is the unfairness in this sentence?

[10] MR. MOGILL: First, I would like to correct what the Court is indicating as to the state of the record. I did not indicate that I had fully advised my client; I indicated I was of the opinion—

THE COURT: Let's read it again.

And that your client full well—and then there is a word deleted—I think there is—that your client knows full well—is the way it reads here—I think the way I said it is that your client full well knows—that your client knows full well what the consequences of a guilty plea might be?

And you say: "That is correct."

What does that mean?

MR. MOGILL: What that means is exactly what it says, that I was of the opinion at that time that my client knew. As I indicated to the Court, I have no way of supplementing the record. The unfairness—

THE COURT: Let's take it your way, that you had an opinion that he knew.

Your opinion, I think, is open to the fair inference that you discussed it with him. That's how you had the opinion. If you didn't have that opinion, you wouldn't

have told me you had it. And you, therefore, obviously have gotten it from having talked about it.

[11] Now, if I told him his exposure was 15 years and he was given 10, and inferentially you told him about the three year parole term, inferentially, and he knew that, where is the unfairness?

MR. MOGILL: There is—I have no recollection one way or the other as to whether or not we discussed the special parole term.

THE COURT: Well, I think I can infer that it was known to him under that state of affairs. Where is the unfairness?

Let's take it the other way. Let's say this doesn't mean anything. Let's delete from the transcript your representation to me that your client was fully informed of the consequences of his plea. Take it out.

MR. MOGILL: You know that I am not asking the Court to take it out. I am satisfied.

THE COURT: Let's take it out, and tell me, if it is taken out, where the unfairness is?

MR. MOGILL: The unfairness arises, Judge, because the Sixth Circuit last year in the *Wolak* case has stated explicitly that where there is no express indication on the record that a defendant was advised of his—

[12] THE COURT: No, that was not *Wolak*. *Wolak* was a situation in which the defendant said to the judge that he didn't understand what that meant and it was not explained to him what it meant. That's what *Wolak* said.

But I am not asking you that. I am asking you where is the essential unfairness to Mr. Timmreck who pleaded guilty knowing that his exposure might be 15 years in prison and I sentenced him to ten years in prison with the special parole term of five years. Where is the unfairness to Mr. Timmreck in that?

MR. MOGILL: The unfairness arises from the Court at this point in time presuming, in order to sustain the plea, that that additional information would not have made a difference in the Defendant's choice to plead back then. And I think that's a presumption that the Court ought not to indulge in.

THE COURT: You know that sometimes common sense seems to go out the window, and this seems to me one of those times.

What a defendant wants to know more than anything else at the time he makes his plea is what is that number going to be, the time that he will have to spend in jail, not the time on parole, but the time I am going to be in prison. And what he wants to know more [13] than anything else is that number. And I think that that's what I had in mind when I think about it. Where is there that I have been unfair to Mr. Timmreck? Because if I can be persuaded of that, I will, apart from the argument that you make, Mr. Zuckerman, and I will hear you on your argument as to whether or not this can be raised in this form—I understand that you have that argument that you wish to make—but assuming that I had no problem with Mr. Zuckerman's argument under 2255 and could decide that that didn't bar my address of your petition, I would not hesitate to set this plea aside and try Mr. Timmreck again.

I head all of the evidence in connection with another trial; I heard all of the tape recordings. I wouldn't have to judge his guilt or innocence. That would be for a jury. There is much evidence from which that finding, if the jury wished to make it, of guilty, could be found, and he could be resentenced again. I wouldn't hesitate to do that if I thought that I had dealt unfairly with him.

I would say this: That if I had said to him, "You will not be imprisoned for more than ten years," and I had said nothing about a special parole term so that there was at least the possibility that he could have thought that after ten years, plus good time behavior, he [14] would be free of all custodial restraint of one kind or another, it would be unfair. But here, you know—and I know that if he serves this sentence with his good time behavior and whatever extra good time behavior he merits—

MR. MOGILL: He has earned every day that he is entitled to.

THE COURT: Yes. That he would not be in a custodial restraint situation for more than 15 years.

As a matter of fact, it will be significantly less, including the five year special parole term.

Now, looking at it that way, where is the unfairness?

MR. MOGILL: Again, Judge, I think the unfairness arises from the Court putting itself in the position of the Defendant. And I think that while I cannot quarrel with the Court's statement, that a substantial number of defendants are concerned only about the amount of time they would be on the inside, I think to infer that in a particular case that that's the sole motivating factor, to infer in this particular case that the absence of that information would not have been dispositive, would have not made Mr. Timmreck's decision different. I think that that's—that requires the Court to speculate in a way [15] which is unfair to the defendant.

THE COURT: Well, I find that difficult.

You see, I can tell you what my state of mind was at the time of sentencing. And because of the heinousness of this crime, irrespective of what Mr. Timmreck said was the degree of his involvement, this was one of the most heinous drug conspiracies that I have presided in trial of. I heard extensive testimony that last for a long time with regard to five of the co-defendants in this case.

And if I had said to Mr. Timmreck at the time of sentencing, "I will sentence you to the custody of the Attorney General for 15 years and then I will add on a special parole term of five years," that that would be unfair. But my state of mind was this: Since I had addressed him in terms of the exposure of his—and this case was thoroughly discussed in the sentencing counsel—that the intent of this could be met by a ten year sentence plus a five year special parole term. And that he knew because he said he knew.

MR. MOGILL: Well—

THE COURT: He knew that he could be exposed to a custodial restraint of 15 years. And, [16] therefore, I sentenced him to ten years plus the five year special parole term. That's why I say: Where is the unfairness?



MR. MOGILL: It is my position, Judge, that *Wolak*, that *Phillips*, which follows *Wolak*, 519 Federal 2d—regardless of any fundamental unfairness—and I would urge the Court to put itself in this position—excuse me—urge the Court not to put itself in the position of second guessing the Defendant at the fact—but those two cases—

THE COURT: I am not second guessing the Defendant. I am sure that it would not have made one bit of difference to Mr. Timmreck if I had said to him in this case, “You will be subjected to a parole term of at least three years,” as far as his guilty plea is concerned. I am not second guessing him because I did not put him in a custodial restraint situation for more than the exposure to which he had knowledge.

And what he was interested in, I’m sure, was what the term in prison would be.

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# SUPREME COURT OF THE UNITED STATES

No. 78-744

UNITED STATES, PETITIONER

v.

CHARLES TIMMRECK

ORDER ALLOWING CERTIORARI. Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.